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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESUS ARMANDO HERNANDEZ, Defendant and Appellant.	B264189 (Los Angeles County Super. Ct. No. BA404252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Modified and affirmed.

Jenny Macht Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jesus Hernandez appeals from the judgment entered following his conviction by jury of one count of possession of an assault weapon. He contends the trial court erred in denying his motion to continue the trial and in admitting evidence arising from a narcotics investigation, which resulted in the discovery of the weapon. We find no error by the trial court. Defendant also challenges the constitutionality of five conditions of his post-release supervision. We agree that the requirement that defendant register as a controlled substance offender must be stricken. Further, we modify the condition requiring defendant to stay away from places where narcotics users, buyers, or sellers congregate. As modified, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. *Procedural Background*

The Los Angeles County District Attorney (the People) filed an information on August 4, 2014 charging defendant in count one with possession of an assault weapon, a Colt AR-15, in violation of Penal Code section 12280, subdivision (b), and in count two with receiving stolen property, in violation of Penal Code section 496, subdivision (a). Count two was later dismissed as barred by the statute of limitations. On the People's motion, count one was amended to charge a violation of Penal Code section 30605, subdivision (a), the current version of section 12280, subdivision (b).

At the conclusion of trial, the jury convicted defendant on count one as charged. The court sentenced defendant to 18 months in state prison, followed by 18 months of mandatory supervision. (Pen. Code § 1170, subd. (h)(5)(B).) Defendant timely appealed.

B. *Evidence at Trial*[1]

1. *Surveillance, Search, and Arrest*

On December 28, 2010, Detective David Busk of the Los Angeles County Sheriff's Department (LASD) was part of a surveillance team assisting a task force of the federal Drug Enforcement Agency (DEA). Busk testified that on that day, his team was asked to conduct surveillance "of a narcotics trafficker for identification purposes." He was told that the target, identified as UM (for "unidentified male") 1690, was connected to a telephone that had been located in a residence on Juniper Street in Los Angeles. After about six hours of surveillance at the Juniper Street house, DEA agents reported based on a wiretapped phone conversation that UM1690 was "going to be involved in a narcotics transaction" that evening. About 15 minutes later, Busk was told that GPS surveillance showed the target phone had left the Juniper Street house and was travelling on a nearby freeway. Busk and his team had been watching the front of the house and had not seen anyone leave. Busk testified that the rear of the home faced an alleyway and the street in front had limited parking, making it "very difficult" to completely surveil.

Busk and his team then went to the location of the purported narcotics transaction in the parking lot of a supermarket. At about 6:20 p.m. the team set up surveillance of the parking lot. Busk, working undercover, parked his vehicle near a green Nissan Altima and noticed an individual sitting in the driver's seat. He identified that person at trial as defendant. About five minutes later, a red Volkswagen Jetta entered the parking lot and parked in the spot next to the driver's side of the Nissan. Within seconds, defendant exited the Nissan and walked to the driver's side of the Jetta. He leaned into the open driver's window and spoke with the driver of the Jetta. That driver handed defendant "an object" and defendant "quickly turned and walked back toward his car."

[1] Prior to trial, the People moved in limine to admit evidence related to narcotics trafficking activities by defendant, arguing it showed defendant had a motive to possess the gun, which he allegedly used for protection in a narcotics "stash" or "load" house. Over defendant's objection, the court ruled the evidence admissible as relevant to defendant's motive for possessing the rifle. We discuss the details of the motion and the court's ruling in connection with our analysis below.

At this point, Busk could see defendant carrying a "kilo sized package," which Busk explained at trial meant a rectangular object matching the size and shape of the standard form of packaging cocaine that has been "smuggled in" from another country. Defendant placed the package behind or under the driver's seat and drove away.

After leaving the parking lot, defendant made several u-turns and other turns before getting on the freeway. As a result of those "moves" Busk testified that they "lost probably half" of the surveillance team following defendant. The remainder of the team followed defendant until he parked and entered a residence on Croesus Avenue. Croesus Avenue runs parallel to Juniper Street, one block to the west; the two residences related to defendant were located on parallel blocks. About half an hour later, defendant emerged, got into the Nissan, and began driving "recklessly," or, in Busk's opinion, using counter-surveillance driving tactics.[2] They followed defendant to the Plaza Mexico, a large shopping center that Busk described as a "favorite with narcotic traffickers." At that point, Busk concluded their surveillance might have been compromised and called it off.

The following day, December 29, 2010, Busk and his team were outside the Croesus Avenue house, preparing to serve a search warrant there. They saw defendant drive southbound past the house, turn the corner at the end of the block and then drive northbound on Juniper Street. After defendant passed the Juniper Street house without stopping, Detective Busk concluded he might be "leaving the area" and directed one of his team members to pull defendant over. Defendant was detained; a pat down search recovered a "large wad" of cash and three cell phones.

The LASD team then proceeded to conduct a search of the Croesus Avenue house. Present in the home were two other adults and two of defendant's children. Detective Busk testified that the house appeared to be a "regular house with furniture and clothing and food," and there was nothing to indicate anyone was in the process of moving. After

[2] Busk testified as to the "counter surveillance" driving methods that narcotics suspects often use, including erratic speeds and lane changes and taking indirect routes to any location.

he was advised of his *Miranda*[3] rights, defendant led officers to a dresser in the master bedroom where they discovered between $5,000 and $10,000 in hundred dollar bills. He denied having any narcotics or weapons in the home. When asked about the Juniper Street house, defendant "appeared to be very surprised that we knew about it." Defendant turned over a set of keys that he said belonged to the Juniper Street house. Defendant also consented to a search of that house. He said that he had rented it a few weeks earlier for "him and his wife to use" because his children and mother-in-law were living with them at the Croesus Avenue house and that he had just started to move "some clothes and furniture and personal effects there for him and his wife."

Detective Busk and several team members entered the Juniper Street house, using defendant's keys. According to Busk, the home "appeared that it was being moved into maybe or moved out of" and did not appear to be lived in at that time. The living room contained a couch and a few chairs. The kitchen was completely empty. The bathroom had a "small amount" of toiletries and the bedroom had a dresser and a bed. The bedroom dresser contained "mainly female clothing" and the closet had "some male clothing." A second bedroom was completely empty. LASD detectives discovered a large hanging garment bag in the closet of the bedroom with furniture. They found a man's jacket and button-down shirt inside the bag, as well as a rifle hanging behind the clothing. Busk identified the gun as an assault rifle, specifically, a Colt AR-15, with a collapsible stock, flash suppressor, pistol grip, and removable 30-round magazine. The rifle was loaded with 28 rounds. The serial number on the rifle identified it as a weapon only to be used by law enforcement personnel.[4]

Busk and his team also searched a detached garage at the Juniper Street house. The garage was located near the alley behind the residence and contained ramps, a floor jack and a tool box. According to Busk, these items were consistent with the operation of

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[3] *Miranda v. Arizona* (1969) 396 U.S. 868.

[4] A report generated by running the rifle's serial number through the Automated Firearms System (AFS), a database used to track firearms, revealed that the rifle belonged to the Phoenix Police Department and had been listed as stolen from the Mesa, Arizona area.

the residence as a "load" house because "when narcotics are smuggled across the border a lot of times they're hidden into what we call traps or hidden compartments" on a car, and often the car must be raised to access such compartments. Busk testified that "if I was teaching a class, I would use that as an example of what a load house garage is."

Based on his training and experience, Busk also further described a "stash" or "load" house as a location used during transportation of narcotics. Stash houses are selected in locations to make law enforcement surveillance difficult. He testified that the Juniper Street house was a "perfect" location for a stash house.

Busk also opined that the presence of the rifle in the house further supported the conclusion that it was a load house, because "in 99 percent of the load houses" he searched, "they have some type of weapon. Normally it's a high-capacity weapon to protect whatever arrives at that house or departs from that house." Busk also testified that drug traffickers "from mid level on up" would generally be unlikely to keep drugs at their primary residence, but would have "a separate house or storage" for the protection of their families.

No weapons were found at the Croesus Avenue house and no drugs were found at either house.

2. *Wiretap Investigation*

John Bur, former task force officer for the DEA, testified at trial regarding the task force, which was "put together specifically to work wiretap investigations targeting the Mexican drug cartels that were importing narcotics into the United States." Bur was one of the lead investigators on the case, which began in 2008. He gave extensive testimony regarding how wiretaps work and background on the investigation, including tracking the chain of suppliers from the original target to an individual named Bernardo Ochoa (also known as "Pedro") and then to defendant.

Blanca Lopez, a DEA linguist, monitored the wiretapped calls and provided Spanish translation for the investigation. Lopez estimated listening to 10 calls involving defendant during the investigation, beginning on December 27, 2010. The DEA had been monitoring a telephone belonging to Ochoa for "quite some time," and on that date they

intercepted a call between Ochoa and defendant. Lopez also opined that the voice identified as UM 1690 on the wiretapped calls was the same as defendant's, based on a Spanish language voice exemplar provided in 2014 by defendant. Ochoa and defendant made multiple calls back and forth on December 27 and 28, 2010, leading up to the purported narcotics transaction in the supermarket parking lot.

Bur testified that, based on the wiretaps, the agents concluded defendant was supplying Ochoa with narcotics, including cocaine. The wiretapped calls between Ochoa and defendant, in Spanish, were played for the jury. Bur then read the English translation of the transcripts of the calls. None of the calls mentioned narcotics. Instead, Ochoa and defendant discussed "check[ing] a car." Bur opined that these calls were using "coded language" to "disguise the conversation" so that the speakers would avoid direct reference to a narcotics transaction. When they discussed car maintenance in their calls, Bur testified that Ochoa and defendant actually were discussing providing a sample of narcotics in order to check the quality. Ochoa also told defendant he was calling "on behalf of Pariente," who Bur testified was a source of narcotics in Mexico. Bur opined that statement by Ochoa was "an introduction to the person being contacted [defendant] that I've spoken to your boss and your boss told me to call you."

In a call on December 27, 2010, shortly before the parking lot transaction, Ochoa told defendant that he was in a red car. In additional conversations, Ochoa and defendant continued to discuss having someone "try . . . out" the car by "tak[ing] it on the freeway [to] see if it runs." Defendant responded that "my job consists of the man calling me and telling me to go see such and such and that's all." Bur testified to his opinion that this discussion reflected a request by Ochoa to have his customer test out the quality of the narcotics and defendant saying "the customer can test the dope. All I do is deliver it." The following day, Ochoa and defendant discussed "tak[ing] the car to the shop" and meeting near the grocery store to drop off "the keys," which Bur interpreted to mean that Ochoa would be returning the sample to defendant.

The prosecution also posed the following hypothetical to Bur based on a description of the Juniper Street house and the rifle recovered there, combined with his

knowledge of the telephone calls: "is it reasonable that a person involved in those telephone calls would have a motive to possess . . . that firearm?" Bur said it was. In his opinion, in light of the telephone calls, the description of the home, and the fact that it was not defendant's primary residence, the Juniper Street house "was a stash location being used to facilitate narcotic transactions," and "in my experience with these investigations . . . stash houses often have weapons . . . to guard the narcotics."

C. *Closing Arguments*

In closing, the prosecutor spent roughly the first half of his argument discussing how the non-narcotics related evidence established the elements of the charged crime of possession of an assault weapon. He then spent the remainder of his argument outlining how the narcotics evidence established defendant's motive to possess the gun, concluding that "we know that [defendant] was a drug trafficker. . . . The defendant set up a load house for narcotics, a stash house within a stone's throw of his family home. . . . Taking into consideration all of the expert opinions, the narcotic wiretaps, there's a lot of motive here to have a high-powered weapon. . . . It definitely speaks to the fact whoever controlled this house was using it for a narcotic related purpose and had this gun [to] protect those assets."

In her closing argument, defense counsel did not directly argue that the gun could have been planted by law enforcement. However, she suggested that possibility by pointing out that no video or photographic evidence was taken of the search of the Juniper Street house or the discovery of the gun, and that the prosecution had not retained or fingerprinted the gun or seized the garment bag in which it was found. She then argued that defendant's conduct, in cooperating with the investigation and consenting to the search, demonstrated that "[e]ither there was no weapon in the Juniper address or he did not know there was a weapon" there. She also pointed out that "we don't know who else might have had access to the house."

In his rebuttal, the prosecutor argued that "you have plenty of evidence the defendant is the guy on that wiretap. He is trafficking cocaine. He's talking about cocaine." The prosecutor concluded by stating "I would submit to you that the important

thing to realize here, given that you've been presented the motive evidence in this case" is that "the person who's accused of this crime has a motive to have that gun. . . . In this case, the motive was to use a weapon like that to protect a valuable asset. This is definitely a case that is extremely worthy of your time."

DISCUSSION

Defendant raises three issues on appeal: (1) the court's denial of his motion to continue trial violated his right to due process; (2) the court erred in admitting evidence of his narcotics trafficking at trial; and (3) multiple conditions of supervised release were improperly imposed during sentencing. We find no error with respect to the first two issues. However, we agree with defendant that one of his supervision conditions must be stricken and one requires modification. We therefore affirm the judgment with modifications.

I. *Denial of Motion for Continuance*

Defendant contends that the trial court abused its discretion in denying his motion to continue the trial. We disagree.

A. *Pre-Trial Hearing and Ruling*

Defendant's trial was set for March 17, 2015. On March 12, 2015, defendant filed a motion for continuance under Penal Code section 1050. Defendant argued that a continuance was necessary for two reasons. First, the prosecution had informed defense counsel on March 12 that they intended to call a witness (Lopez) to testify that the voice on the wiretapped phone calls matched the voice exemplar provided by defendant. Defense counsel stated that she had "no background information on this witness" and therefore needed time to explore the witness's findings. Second, defense counsel recently had requested from the People any records from the AFS database that would show other searches run for the same weapon or searches for other weapons performed by the investigating officers in this case. According to defendant's counsel, such information might support a defense that the police planted the rifle in the Juniper Street house. Therefore, a continuance was necessary so that the People could produce any relevant discovery.

The court heard argument on defendant's motion on March 17, 2015. With respect to the AFS database information, the court noted that "theoretically it potentially could be exculpatory depending on the results from that search." The court therefore directed the People to "provide defense counsel with all potentially exculpatory evidence" pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, "at the earliest possible moment." Recognizing that "this is a 2010 case that was filed November of 2012" and also that the public defender only had been on the case since January of 2014,[5] the court concluded that "this case needs to go to trial" and denied the motion.

B. *No Error in Denying Continuance*

Continuances in criminal cases may be granted only for good cause. (Pen. Code, § 1050, subd. (e).) Whether good cause exists rests within the sound discretion of the trial court. (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) This discretion '"may not be exercised in such a manner as to deprive the defendant of reasonable opportunity to prepare his defense.' [Citation.]" (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333 (*Fontana*).) Upon review, defendant bears the burden of establishing that denial of a continuance constituted an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003, overruled on another ground in *People v. Pearson* (2013) 56 Cal.4th 393, 462.) "'[A]n order of denial is seldom successfully attacked.' (5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Trial, § 2502, p. 3002 .)" (*People v. Beeler, supra*, 9 Cal.4th at p. 1003.) "In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request." (*People v. Frye* (1998) 18 Cal.4th 894, 1013, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Reversal of a conviction is unwarranted if the defendant fails to show an abuse of discretion and resulting prejudice. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.)

[5] Although the case was originally filed in 2012, defendant was not arraigned on the information until August 2014. Defendant's prior privately-retained counsel withdrew in December 2014.

The trial court did not abuse its discretion here in finding defendant lacked good cause to justify a continuance. Defense counsel failed to offer sufficient justification for the delay in seeking the AFS database discovery or anything more than speculation regarding what that discovery might reveal. Moreover, the court ordered the prosecutor to turn over any exculpatory or impeachment material. There is no indication in the record that the People failed to follow the trial court's order. Indeed, Detective Busk testified at trial that, to the best of his knowledge, the AFS system did not track the information defendant was seeking.

Similarly, defense counsel's purported inability to gather background material on Lopez, the DEA voice identification witness, prior to trial did not warrant a continuance. Lopez offered a lay opinion comparing defendant's voice exemplar with the voice of UM 1690 on the wiretapped recordings. Her testimony on this point was brief and uncomplicated and there is no indication that defense counsel was unprepared or unable to cross-examine her on this issue. Defense counsel's suggestion that she needed an unspecified amount of time to "explore [Lopez's] findings," alone, is insufficient to justify the continuance here.

Moreover, any error was not prejudicial to defendant. Defendant has not demonstrated a reasonable probability that the outcome of the trial would have been more favorable to him absent the trial court ruling. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 945, abrogated on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 107.) As noted, there is no evidence that the AFS database was capable of producing the information regarding prior searches of a particular weapon. Nevertheless, defense counsel was able to suggest that the weapon might have been planted in her closing argument by pointing out the absence of video recording or physical evidence from the search of the Juniper Street house. Defense counsel in closing also urged the jury to make its own determination regarding the comparison between defendant's voice and UM 1690 and to disregard Lopez's lay opinion if warranted. Further, Lopez's testimony connecting defendant's voice to the wiretapped conversations was bolstered by other evidence suggesting that defendant was UM 1690, including the details of the planned

narcotics transaction which exactly matched the parking lot transaction between defendant and the driver of the red Jetta.

Defendant's cited cases are inapposite. In *Fontana*, for example, defense counsel requested a continuance of a probation revocation hearing, which was triggered by a pending charge for rape and sodomy in another county. (*Fontana, supra*, 139 Cal.App.3d at pp. 332-333.) Defense counsel stated he was unprepared to proceed and explained in detail his time spent on recent complex trial cases and that he had not had the opportunity to read the preliminary hearing transcript, to have any discussion with his client, or to read his client's statement or other materials necessary to cross-examine the only witness against his client. (*Ibid*.) Counsel requested a one-week continuance, which the trial court denied. (*Ibid*.) On appeal, the court found that the denial of a continuance resulted in a deprivation of "appellant's right to the effective assistance of counsel and his right to confront and cross-examine the sole adverse witness. . . ." (*Id*. at p. 333; see also *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 876 ["The absence of a material witness for the defense, under appropriate conditions, has long been recognized as a ground for continuance."].) Here, by contrast, defense counsel did not demonstrate that she was unprepared for trial on any material issue or that defendant was otherwise deprived of the right to prepare his defense. Thus, the court did not abuse its discretion in moving the case to trial.

II. *Admission of Narcotics Evidence*

A. *Legal Principles*

As a general rule, evidence of a person's character, including evidence of specific instances of uncharged misconduct, is inadmissible to prove the conduct of that person on a specific occasion. (Evid. Code § 1101, subd. (a).)[6] This type of evidence is sometimes referred to as criminal disposition or propensity evidence. (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609.) The rule, however, is qualified by section 1101, subdivision (b) (section 1101(b)), which permits admission of evidence of uncharged misconduct

[6] All further statutory references are to the Evidence Code unless otherwise indicated.

when such evidence is relevant to establish some fact other than the person's character or disposition, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." When reviewing the admission of evidence of other offenses, a court must consider the materiality of the fact to be proved or disproved and the probative value of evidence of other crimes to prove or disprove the fact. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.) "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*).)

Although evidence of uncharged conduct may be admissible under section 1101(b), that evidence may nevertheless be inadmissible under section 352 if it is unduly prejudicial. A determination of admissibility under section 352 requires the balancing of the probative value of the evidence against its potential prejudicial effect. (*Ewoldt, supra,* 7 Cal.4th at pp. 404-405.) "Without doubt, evidence a defendant committed an offense on a separate occasion is inherently prejudicial. [Citations.] But Evidence Code section 352 requires the exclusion of evidence only when its probative value is substantially outweighed by its prejudicial effect. 'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' [Citation.]" (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.)

We review a challenge to a trial court's decision to admit uncharged misconduct evidence for abuse of discretion. (See, e.g., *People v. Kipp* (1998) 18 Cal.4th 349, 369-371.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*Id*. at p. 371.)

B. *Pre-Trial Hearing and Ruling*

Prior to trial, the People moved to admit "the wiretap evidence" pursuant to section 1101(b). They argued that the evidence would establish that defendant "was a mid-level narcotics trafficker" who used the Juniper house "to unload vehicles loaded with drugs, stash narcotics, and protect them" with the rifle. As such, they contended this evidence was admissible under section 1101(b) to show that defendant had a motive to

possess the gun and to demonstrate defendant's knowledge that the gun was located in the Juniper house. While the motion expressly addressed only the admission of testimony from DEA witnesses "regarding the wiretap," the moving papers also stated the prosecution's intent to introduce at trial other evidence related to narcotics trafficking, including expert testimony regarding "the fact that Juniper appears to have been used as a load house or stash pad," and that "defendant's possession of a rifle of the type found at Juniper fits perfectly within the scope of his business as a narcotics trafficker."

During the hearing on the motion, the trial court noted that "the People are asking to introduce what appears to me to be a significant amount of evidence regarding Mr. Hernandez's being involved in a drug dealing business." The court further noted the proposed expert testimony to the effect of, "I've been in a thousand stash houses . . . and this is typical of what I see. . . . And therefore, based on my experience with all of this it wouldn't be surprising to find a gun in the place."

Defense counsel objected that narcotics evidence was irrelevant to the gun charge and highly prejudicial. The prosecutor argued that the evidence was critical to establish defendant's motive, particularly to rebut any defense that the gun was planted. Defense counsel stated that she was awaiting the AFS discovery before she could confirm whether she would argue that the police planted the gun, but she did not rule it out; she further suggested a possible argument that someone else could have put the gun in the home, noting that defendant rented the house but "he would have no information in terms of how many keys, how many people had access."

The trial court agreed that the evidence was "highly prejudicial," but concluded it was admissible, finding the narcotics evidence was relevant to motive and was "the only way the weapon possession and everything else makes sense, the only thing that really counters the argument" that it was planted by law enforcement or placed by someone other than defendant. The court then stated it was admitting the wiretapped calls to support the proffered motive. When defense counsel pointed out that the calls themselves did not reference the stash house, the court clarified that it would allow testimony to "establish that [defendant] is dealing drugs in their expert opinion, that that house is a

stash house . . . as the motive for him to possess this weapon in the way it was supposedly possessed."

C. *Analysis*

1. *Forfeiture*

The Attorney General argues that defendant has forfeited the right to challenge the admission of any narcotics evidence other than the wiretaps, suggesting that defendant's "only objection [at trial] was specifically to the wiretap evidence, in the context of opposing the People's motion in limine to admit that evidence." We find no forfeiture.

While the People's motion expressly sought to admit only the wiretap evidence, both the moving papers and the People's argument during the hearing on the motion made it clear they intended to proffer a much broader range of narcotics evidence, particularly expert testimony that the Juniper Street house was a stash house. Indeed, the wiretap evidence alone would have been insufficient to support the People's only theory of admission—that defendant had a motive to possess the rifle because he was a narcotics trafficker who used the rifle to protect his stash house. Similarly, the lengthy discussion during the hearing on the motion in limine clarified that the People sought to admit, over defendant's objection, evidence including the wiretaps, the deputies' surveillance of defendant in the days leading up to his arrest, and expert testimony regarding stash houses and the Juniper Street house.[7] In context, defense counsel's objection to "all this information" as irrelevant and unduly prejudicial reflected an objection to the entire body of narcotics evidence the prosecution was seeking to admit. As such, defendant's objection was sufficient to preserve the issue for appeal.

[7] At the time of the hearing on the People's motion, the trial court recently had received the case and noted that it had read the moving papers but had not yet read the preliminary transcript or the entire file. Thus, while there was some inconsistency in the trial court's comments on the scope of the evidence admitted, it appears that was due to a lack of familiarity with the scope of the wiretap evidence, rather than an intent to exclude some of the narcotics evidence. From the entirety of the discussion at the hearing, it is clear that the court intended to admit the evidence it found relevant to defendant's motive, including the testimony regarding the stash house.

2. *No Error in Admitting Narcotics Evidence*

Defendant contends the trial court erred in admitting evidence of his alleged involvement in narcotics activity. He argues the trial court should have excluded this evidence because it was irrelevant (§ 350), it constituted inadmissible character evidence (§ 1101), or, alternatively, its probative value was substantially outweighed by the potential for undue prejudice (§ 352). We disagree.[8]

a. *Relevance*

Defendant first asserts that the narcotics evidence was inadmissible profile evidence, irrelevant to his charged crime and improperly used to suggest his propensity to possess a high-powered assault rifle as a narcotics trafficker. "A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084 (*Robbie*).) "In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile." (*People v. Prince* (2007) 40 Cal.4th 1179, 1226.) In other words, the expert "'attempts to link the general characteristics of [a particular type of criminal] to specific characteristics of the defendant.'" (*Ibid*.) In doing so, profile evidence may improperly invite the jury "to conclude that, because the defendant manifested some of the collected characteristics, he also committed the crime." (*Robbie, supra,* 92 Cal.App.4th at pp. 1086-1087.)

Thus, for example, in *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072, in a trial for heroin possession, the prosecution offered expert testimony by a police officer that "'the typical heroin dealer is usually a Hispanic male adult,'" and that the "'tar heroin market in Northern San Diego County . . . is controlled by Hispanics.'" (*Id*. at p. 1072, italics omitted.) On appeal, the court found this testimony inadmissible, reasoning that it did not connect the defendant to the crime charged—narcotics possession—but instead implied that defendant was a heroin dealer because he was "an Hispanic adult

[8] We note that while the Attorney General argued that the narcotics evidence was relevant to motive, respondent's brief did not address defendant's arguments and authority regarding profile evidence and the balancing of factors under section 352.

male and was arrested in [northern San Diego County] for possessing tar heroin." (*Ibid*.) As the court explained, "every defendant has the right to be tried based on evidence tying him to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile. [Citations.] Introduction of the latter evidence improperly invites a finding of guilt by association and undermines the defendant's right to a fair trial." (*Ibid*.) Similarly, in *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 8, the defendant was caught driving into the United States from Mexico in his truck with 193 pounds of marijuana hidden among roofing shingles. He claimed he was coming into the country to look for roofing work. (*Id*. at p. 9.) To help establish defendant's knowledge, the prosecution presented expert testimony about the structure and practices of drug trafficking organizations, including the various roles that individuals in drug trafficking organizations perform. (*Id*. at pp. 9-11.) The expert also gave "extensive testimony" as to the "characteristics of drug smugglers and their behavior," including "the times of day when a person would be more likely to attempt to smuggle drugs across the border, the types of vehicles that a smuggler might use, and the likelihood that a smuggler would be carrying a cellular phone." (*Id*. at p. 16.) The court concluded that this testimony was inadmissible profile evidence, noting the broad scope of the expert's testimony and the lack of any evidence connecting the defendant to a drug trafficking organization. (*Ibid*; see also *People v. Martinez* (1992) 10 Cal.App.4th 1001 [expert testimony on auto theft and smuggling rings inadmissible to prove defendant knew the car he bought was stolen]; *Robbie, supra*, 92 Cal.App.4th 1075, 1084-1086 [excluding expert's opinion that defendant's conduct-as described by sexual assault victim-was prevalent among sex offenders].)

"'Profile evidence,' however, is not a separate ground for excluding evidence"; like other evidence, "it is inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (*People v. Smith* (2005) 35 Cal.4th 334, 357; see also *People v. Prince, supra*, 40 Cal.4th at p. 1226 ["'[P]rofile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt.' [Citation.]"].) Thus, at their core, the cases rejecting

profile evidence did so because the attempt to tie defendant to the crime based on a certain "profile" lacked probative value and failed to establish that defendant committed the crime charged.

Here, we do not agree that the narcotics trafficking evidence was improper profile evidence. Each of the cases cited by defendant lacked evidence tying the defendant to the uncharged acts; nevertheless, the prosecution used those uncharged acts to create a profile to link defendant back to the charged crime. Here, on the other hand, rather than suggest that defendant fit the "profile" of a narcotics trafficker based on potentially innocuous characteristics, the prosecution offered evidence tending to show actual narcotics trafficking activities by defendant, such as his wiretapped phone conversations, his counter-surveillance measures, and his parking lot transaction. This evidence was relevant to support the prosecution's theory that defendant was a mid-level narcotics trafficker and offer an explanation for why he had a stolen assault rifle in his mostly-empty house. It also provided necessary background to explain the surveillance and eventual search of defendant and his houses.

Defendant focuses largely on the expert testimony describing a typical "stash" or "load" house and opining that the Juniper Street house matched that profile, as well as the testimony that weapons were used in "99 percent" of load houses. When coupled with the substantial evidence of defendant's narcotics activities, this testimony was admissible to explain the basis for the expert opinion that the Juniper residence and garage were set up as a stash house. (See *People v. Lopez* (1994) 21 Cal.App.4th 1551, 1555-1556 [noting police officer with appropriate expertise may testify cocaine is sold in small plastic baggies to explain the significance of the evidence seized]; *People v. Harvey* (1991) 233 Cal.App.3d 1206 [police expert permitted to testify in detail concerning the organization and methods employed by Colombian cocaine rings and that defendants' activities were consistent with narcotics trafficking]; *People v. Derello* (1989) 211 Cal.App.3d 414, 426 [no error in admitting certain characteristics of the drug courier profile as "evidence of ongoing criminal activity" to "prove the material facts of knowledge and intent," such as the use of aliases and "the peculiar manner of these

defendants' moving through the concourse"].) Defendant was free to present innocent explanations for his behavior, which he did, including his argument that he was moving into the Juniper Street house. He also was able to cross-examine the prosecution witnesses regarding the factual bases for their opinions and point out any weaknesses in those opinions.

In sum, because there was substantial evidence linking defendant to the uncharged narcotics trafficking, evidence of that trafficking did not amount to evidence that defendant fit a criminal "profile" and was relevant to prove defendant's motive for possessing the rifle.

b. *Weighing under section 352*

Although the trial court recognized that the narcotics evidence was prejudicial to defendant, it concluded that its probative value outweighed any prejudice and the evidence therefore was admissible under section 352. We conclude it was not an abuse of discretion to do so. "The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371.)

In weighing the prejudicial effect of uncharged conduct against its probative value pursuant to section 352, courts consider factors including: (1) whether the evidence of the uncharged act is stronger or more inflammatory than the evidence of the charged offense; (2) whether the uncharged act resulted in a criminal conviction; (3) the remoteness in time of the uncharged conduct; and (4) consumption of time. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 737-739; *Ewoldt*, *supra*, 7 Cal. 4th at p. 404; *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) While two of these factors heighten the potential prejudicial effect, we conclude that they do not require exclusion.

First, the relative strength and nature of the narcotics evidence compared with the non-narcotics evidence does not weigh strongly in either direction. Both the evidence of defendant's narcotics trafficking and of his possession of the residence in which the rifle was discovered were strong. We also do not believe the evidence of defendant's

narcotics trafficking was significantly more inflammatory than the evidence that he possessed a fully-loaded, high-powered assault rifle, which had been stolen from a police department. The details offered regarding the narcotics trafficking were largely limited to those necessary to explain the DEA investigation or directly related to defendant's conduct.[9] We also note that the prosecutor repeatedly reminded the jury during closing argument that the narcotics evidence was relevant to defendant's motive, and that the jury was properly instructed that evidence of defendant's drug trafficking could be considered only for motive.

Second, as explained by the court in *Ewoldt*, *supra*, 7 Cal. 4th at p. 405, "the prejudicial effect of this evidence is heightened by the circumstance that defendant's uncharged acts did not result in criminal convictions. This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of 'confusing the issues' (Evid. Code, § 352), because the jury had to determine whether the uncharged offenses had occurred." Here, this evidence weighs against admission, as there was no indication that defendant was charged with or convicted of any narcotics activity. Similarly, the narcotics evidence consumed a large part of the trial. Thus, these two factors increase the potential prejudice from admission of the narcotics evidence.

On the other hand, defendant's purported narcotics activities occurred within a few days of the discovery of his possession of the rifle. Thus, the remoteness of the conduct increases its probative value and counsels against exclusion.

We conclude that the probative value of the narcotics evidence in this case was substantial, as it offered an explanation for why defendant would possess a stolen assault rifle in a house he claimed he was just moving into. This is particularly true where, as

[9] We note that defense counsel did not object during trial to the scope, or any other aspect, of any of the narcotics evidence. Thus, defendant has forfeited any argument that the evidence introduced was broader than the trial court allowed when ruling on the People's motion in limine.

here, defendant opened the door to such evidence by arguing that someone else might have planted the gun. The trial court noted, without the evidence of defendant's narcotics trafficking activities, the prosecution would have no way to explain why defendant had the gun. While we agree with the trial court that the narcotics evidence was prejudicial, considering all the circumstances, we cannot find that it was an abuse of discretion for the court to determine that its substantial probative value outweighed such prejudice.

3. *Error Was Not Prejudicial*

The Attorney General argues that any error was harmless, given the uncontested evidence that defendant had access to and control over the Juniper Street house where the gun was found. We agree. We review a court's erroneous admission of prior misconduct evidence under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, requiring reversal if there is a reasonable probability that the defendant would have obtained a more favorable result absent the error. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 22.)

Here, the evidence that defendant was in possession of the Juniper Street house was undisputed—he admitted that he had rented the house and had begun moving his belonging into it and provided law enforcement officers with the keys. In addition, the garment bag where the rifle was found contained men's clothing. Nor was there any evidence of anyone else accessing the house or placing the rifle in the closet. As such, even if the court erred in admitting the narcotics evidence, there is no reasonable probability that a result more favorable to defendant would have been reached in the absence of the evidence.[10]

III. *Conditions of Release*

Defendant challenges five of the conditions imposed as part of his mandatory supervision pursuant to Penal Code section 1170, subdivision (h)(5)(B). As conditions of his supervision, he was ordered to: (1) "support any dependents that he may have as directed by the probation officer;" (2) "maintain a residence as approved by the probation

[10] As we have found no individual error, we also reject defendant's argument that he was subject to prejudice based on cumulative error.

officer;" (3) "stay away from places where users, sellers, buyers congregate;" (4) avoid "associat[ing] with persons known to be substance users or sellers, except in an authorized treatment program;" and (5) register as a controlled substance offender pursuant to Health and Safety Code section 11590.

Defendant asserts that the first four of these conditions are unconstitutionally vague and overbroad, while the fifth condition is unauthorized under the applicable statutes. The parties contend, and we agree, that we may look to the case law evaluating the constitutionality of probation conditions as analogous to the conditions of mandatory supervision imposed here. (See Pen. Code § 1170, subd. (h)(5)(B) ["During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation. . . ."]; *People v. Martinez* (2014) 226 Cal.App.4th 759, 763-764 [noting that "mandatory supervision is more similar to parole than probation" and that "[t]he validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions"].)

"In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety. [Citations.]" (*People v. Martinez, supra,* 226 Cal.App.4th at p. 764; see also *People v. Anderson* (2010) 50 Cal.4th 19, 26; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120–1121.) Accordingly, we review the imposition of a particular condition of mandatory supervision for abuse of that discretion. (See *People v. Martinez, supra,* 226 Cal.App.4th at p. 764.) "'As with any exercise of discretion, the court violates this standard when it imposes a condition of [mandatory supervision] that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]' [Citation.]" (*Ibid*.) With that understanding, we turn to an examination of the challenged conditions.

A. *Conditions regarding support of dependents and maintaining a residence*

Defendant challenges the conditions requiring him to "support any dependents" and "maintain a residence" as vague and overbroad because the conditions do not specify

exactly what defendant is required to do and could potentially infringe on his rights to "freely associate and travel." Defendant concedes that he did not object to the imposition of these conditions below, but argues that he may raise these objections for the first time on appeal because they present a pure question of constitutional law that may be resolved without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887–888 (*Sheena K.*).)

Contrary to defendant's assertion, we conclude that resolution of defendant's challenges to these conditions would require examination of the individual facts and circumstances of defendant's case. (*Sheena K., supra*, 40 Cal.4th at p.885 ["characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case"].) Indeed, in his briefs submitted on appeal, defendant argues that the trial court should have considered such circumstances as whether defendant desired to be a stay-at-home father or live with his family in determining the scope of appropriate supervision conditions. Therefore, he has forfeited these objections by failing to raise them below.

B. *Conditions regarding congregation and association*

Defendant also challenges the conditions requiring him to "stay away from places where users, sellers, buyers congregate" and to avoid "associat[ing] with persons known to be substance users or sellers, except in an authorized treatment program" as vague and overbroad. We agree in part, and modify the stay-away condition accordingly.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.'" (*Sheena K., supra*, 40 Cal.4th at p. 890.) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Ibid.*) Moreover, a "probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Ibid.*) If a reviewing court concludes on the merits that a probation

condition is unconstitutionally vague or overbroad, the court may modify the condition so as to render it constitutionally sound. (*Id.* at pp. 878, 892.)

Defendant contends the condition requiring that he stay away from places where users, buyers, and sellers congregate is unconstitutionally overbroad and vague because it does not contain a knowledge requirement. We agree. California appellate courts have routinely added an explicit knowledge requirement to probation conditions prohibiting a probationer from associating with certain categories of persons, frequenting or remaining in certain areas or establishments, and possessing certain items. (See *People v. Kim* (2011) 193 Cal.App.4th 836, 843–845, and cases cited therein; see also *People v. Lopez* (1998) 66 Cal.App.4th 615, 627-629; *People v. Garcia* (1993) 19 Cal.App.4th 97, 101-103.) The same is true here. Because defendant could be deemed to be in violation of the conditions of his supervised release by unknowingly frequenting an area where narcotics users, buyers, or sellers congregate, the condition is vague. We therefore modify the condition to require defendant to "stay away from places where he knows users, sellers, or buyers congregate."

We reject defendant's contention that it unclear from these conditions that he is restricted only as to individuals associated with *illegal narcotics*, because one condition specifies only "users, sellers, buyers" while the other forbids association with "substance users or sellers." It is clear from the context of all of defendant's conditions of mandatory supervision that these terms refer to users, sellers, and buyers of controlled substances without a lawful prescription, which is sufficiently precise and narrowly tailored to survive defendant's constitutional challenge. We also find that the terms "congregate" and "associate" are sufficiently clear to provide defendant notice as to what locations and actions he must avoid without violating the conditions of his release.

C. *Registration as controlled substance offender*

The Attorney General concedes that the provision requiring defendant to register as a controlled substance offender is improper and must be stricken. We agree, as defendant was not convicted of an offense requiring such registration. (Health & Saf.

Code § 11590.) We therefore strike that provision from defendant's conditions of mandatory supervision.

DISPOSITION

The order imposing conditions of post-release mandatory supervision is modified as follows: (1) strike the condition requiring defendant to register as a controlled substance offender; and (2) modify the third challenged condition to state that defendant must "stay away from places where he knows users, sellers, or buyers congregate." As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.